

# TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.  
A-8601

In Re Application Of: Nyle ELLIOTT

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
10/667,655	September 23, 2003	Adam Marcetich	20741	3761	9116

Invention: COLOSTOMY ALERT DEVICE AND METHOD

## COMMISSIONER FOR PATENTS:

Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal filed on:

August 14, 2008

☒ Applicant claims small entity status. See 37 CFR 1.27

The fee for filing this Appeal Brief is: \$255.00

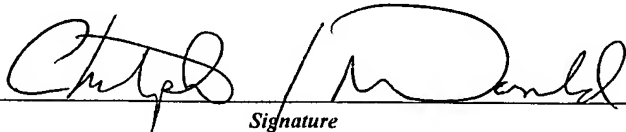
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Dated: August 19, 2008

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I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the application of:

**Nyle ELLIOTT**

Group Art Unit: **3761**

Serial No : **10/667,655**

Examiner: **Adam Marcetich**

Filed : **September 23, 2003**

For : **COLOSTOMY ALERT DEVICE and METHOD**

**APPLICANT'S APPEAL BRIEF**  
**UNDER 35 U.S.C. §41.37**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**(1) REAL PARTY IN INTEREST**

The real party in interest is Oakington Corporation, the assignee of the application.

**(2) RELATED APPEALS AND INTERFERENCES**

There are no related appeals and interferences.

**(3) STATUS OF CLAIMS**

Claims 1-12 and 21-24 are rejected; claim 13-20 are cancelled.

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**(4) STATUS OF AMENDMENTS**

An amendment after final rejection was filed on June 5, 2008. An advisory action was mailed on July 9, 2008, treating the amendment as a request for reconsideration. As the amendment simply corrected a minor problem of antecedence in claim 10, it is assumed that the amendment is entered for purposes of appeal. The change, to claim 10, is reflected in the claims appendix.

**(5) SUMMARY OF CLAIMED SUBJECT MATTER**

As embodied in claim 1, an alert device for detecting the presence of fecal matter has a pad 12 having an aperture 16, seen in figure 1. An alarm 38 is attached to the pad with a first and second conductor 24,26, seen in figure 2, extending from the aperture to the alarm. A plug 14 has a third and fourth conductor 92,94, seen in figure 4, the plug being removably secured to the pad at the aperture.

Claim 9 further recites that the third and fourth conductors each comprise a pair of spaced-apart conductive rings 80, 100; 82, 102, seen in figure 4.

Claim 21 further define each of the third and fourth conductors as having a lower ring 100, 102, an upper ring 80,82 and an upwardly extending section 92,94 extending between the upper and lower rings with the upper ring extending about the outer surface and the lower ring extending about the inner surface, as seen in figure 4 and discussed in paragraph [0022].

Claim 23 recites that the first and second conductor each comprise a first section 24,26 extending from a circuit board to the aperture and a ring 20,22 extending around the aperture, as clearly seen in figure 2 and discussed in paragraph [0021].

**(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

1) The rejection of claims 1-3, 5-7, 10 and 11 as being obvious over US 6,350,255 (von Dyck) in view of US 5,266,928 (Johnson).

2) The rejection of claims 9 and 21-24 as being obvious over US 6,350,255 (von Dyck) in view of US 5,266,928 (Johnson) in view of US 5,036,859 (Brown).

**(7) ARGUMENT**

Rejection under 35 U.S.C. 103 as being obvious over US 6,350,255 (von Dyck) in view of US 5,266,928 (Johnson).

In rejecting claim 1, the Examiner relies upon von Dyck as disclosing a pad 12 having an aperture and a plug (closure 18) removably secured to the pad. The Examiner states that von Dyck does not disclose an alarm having first, second, third and fourth conductors in the pad and plug and relies upon the disclosure of Johnson for these features. The Examiner refers to the contacts 33, 34, and spaced conductors 18, 19 of Johnson and alleges that it would have been obvious to use the alarm of Johnson with the device of von Dyck. The Examiner concludes that "modifying the structure of Johnson would have been obvious to fit the geometry of the ostomy bag and plug of von Dyck."

Johnson discloses a wet diaper detector having a flexible strip 15 with spaced conductors 18, 19 placed on the inside of a diaper. The strip connects with a flexible band 23 on the exterior of the diaper carrying an electronic detector and alarm circuitry. The Examiner is correct that the alarm relies upon the change in

resistance between two conductors for triggering an alarm. However, all electronic alarms rely on the opening and closing of a circuit in order to activate the alarm. This similarity between Johnson and the invention is far outweighed by the differences and is not enough to support a finding of obviousness based upon the combination of Johnson and von Dyck.

von Dyck discloses a closure member 18, relied upon by the Examiner as the claimed plug, and a base plate 12 relied upon the Examiner as the pad. The alarm disclosed by Johnson is a removable strip 15 carrying conductors and attachable to an alarm strip and is too disparate in form and application to be used with the device disclosed by von Dyck. Although the teaching of the secondary reference need not be physically combinable with the primary reference, the teaching of a flexible strip on a diaper does not support the finding of obviousness by being combined with the pad having a closure 18 disclosed by von Dyck.

The Examiner's contention that the geometry of Johnson's alarm can be modified to fit von Dyck's device, and thereby render the claims obvious, can not overcome the fact that the claimed elements are not disclosed or suggested by the prior art.

Rejection under 35 U.S.C. 103 as being obvious over US 6,350,255 (von Dyck) in view of US 5,266,928 (Johnson) in view of US 5,036,859 (Brown).

#### Claim 9

The Examiner rejected claims 9 and 21-24 over von Dyck and Johnson in further view of Brown, relying upon Brown for disclosing spaced apart conductors with an upwardly extending section between conductors. Referring to FIG. 2 of Brown, the

disclosed detector is very similar to that of Johnson. Conductors on a flexible strip are placed on the surface of an undergarment and connect to an alarm 20 placed on the undergarment.

Claim 9 states that the third and forth conductors, on the plug, each comprise a pair of spaced apart conductive rings. This arrangement of the invention is most clearly seen in FIG. 4. Brown does not disclose the claimed rings and such is recognized by the Examiner. The Examiner makes the rejection stating that "changing the shape of electrodes 106 and 104 of Brown to ring shaped is within the scope of obviousness." However, Brown, like Johnson, discloses a flat flexible strip and adapting the conductors to a cylindrical plug fitting within an aperture of a pad is a much bigger leap than is justified by the disclosure of Brown. The Examiner again dismisses differences between the claims and prior art by stating that they are within the scope of obviousness, but obviousness must be supported by the disclosure of the prior art.

#### Claim 21

As the plug identified by the Examiner, closure 18, does not extend very far within the lumen 48 of von Dyck, there is no need for spaced apart conductors.

The Examiner refers to annotated FIG. 7 of Johnson as showing the equivalent of an upwardly extending section of claim 21. However, it must be realized that FIG. 7 is a schematic drawing and has no bearing on the actual physical geometry of the alarm of Johnson.

Claim 23

Claim 23 recites the first and second conductor each comprise a first section extending from a circuit board to the aperture and a ring extending around the aperture. The prior art does not disclose this structure. The Examiner states that reshaping an electrode to fit around a plug is within the scope of obviousness as discussed for claims 9 and 21. But the prior art does not disclose an alarm having conductors leading to and from a plug. Despite this, the Examiner finds the recited structure obvious. Under the Examiner's reasoning, an alarm between a plug and pad is obvious over the cited art regardless of the structure of the alarm, as it is all within the scope of one of ordinary skill in the art. The differences between the prior art alarms and the invention do not support this conclusion.

Conclusion

None of the prior art of record discloses the claimed limitations regarding the alarm and its relationship with the pad and plug. The Examiner recognizes this and states that the changes in geometry are within the scope of obviousness. However, under the Examiner's reasoning, the patents relied upon the Examiner would render any alarm between a pad and plug obvious, regardless of the structure of the alarm. Such a broad statement cannot be allowed to support a finding of obviousness.

It is respectfully requested that the rejections be overturned and the application allowed to issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Chris McDonald', written over a horizontal line.

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**CLAIMS APPENDIX**

1. An alert device for detecting the presence of fecal matter comprising:

- a pad having an aperture;
- an alarm attached to said pad;
- a first and second conductor extending from said aperture to said alarm;
- a plug,
- a third and fourth conductor on said plug, said plug removably secured to said pad at said aperture.

2. The alert device of claim 1 wherein said alarm emits an audible alarm.

3. The alert device of claim 1 wherein said alarm emits a visible alarm.

4. The alert device of claim 1 wherein said alarm emits a tactile alarm.

5. The alert device of claim 1 wherein said alarm transmits a signal to a remote location.

6. The alert device of claim 1 wherein said plug is secured in said aperture by mating threads.

7. The alert device of claim 1 wherein said pad is a flexible, elastomeric material.

8. The alert device of claim 1 further comprising an inflatable cuff encircling said plug.

9. The alert device of claim 1 wherein said third and fourth conductors each comprise a pair of spaced-apart conductive rings.

10. The alert device of claim 1 further including an absorbent sleeve disposed about said plug.

11. The alert device of claim 1 wherein said plug includes a filter.

12. The alert device of claim 1 further comprising an adhesive ring attached to one side of the pad.

21. The alert device of claim 9, wherein the third and fourth conductors each comprise

a lower ring, an upper ring and an upwardly extending section extending between the upper and lower rings.

22. The alert device of claim 21, wherein the plug comprises a lumen having an outer surface and an inner surface,

the upper ring extending about the outer surface and the lower ring extending about the inner surface.

23. The alert device of claim 21, wherein the first and second conductor each comprise a first section extending from a circuit board to the aperture and a ring extending around the aperture.

24. The alert device of claim 1, wherein the first conductor is electrically conducted to the third conductor and the second conductor is electrically conducted to the fourth conductor when the plug is placed with in the aperture.

**EVIDENCE APPENDIX**

None

**RELATED PROCEEDINGS APPENDIX**

None